FEB 27 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 507

ALFRED SYLVANUS, ARCADIA NATIONAL INSURANCE COMPANY AND VOYLE CLARK JOHNSON,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROGER SHERMAN,
HENRY F. TENNEY,
S. ASHLEY GUTHRIE,
120 S. La Salle Street,
Chicago 3, Illinois,
Attorneys for Petitioners.

S. ASHLEY GUTHRIE,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

I. The Question of Construction of the McCarran Act 2-4

II. The Question as to the Sufficiency of the Conspiracy Count and of the Proof Thereunder..... 5-6

III. The Conflict in the Decisions as to the Duty of the Insured to Read His Policy and to Be Bound by the Terms Thereof..... 7-9

Table of Cases and Statutes Cited.

Badders v. United States, 240 U. S. 391..... 4, 5

Bowers v. Washington Times, 65 Fed. (2d) 200 (C. A., Dist. Col.) 7

Fiswick v. United States, 329 U. S. 2[illegible]1 (218)..... 6

Kotteakos v. United States, 328 U. S. 750..... 6

North Little Rock Transp. Co. v. Casualty Reciprocal Exchange, 181 Fed. (2d) 174 (CCA, 8; Cer. Den. 340 U. S. 823)..... 3

United States v. Britton, 108 U. S. 199 (204-5)..... 5

United States v. McLaughlin, 169 Fed. 302 (307)..... 5

United States v. Southeastern Underwriters, 322 U. S. 533 4

Title 15, U. S. C. Sec. 1012..... 2

Title 18, U. S. C. Sec. 371..... 5

U. S. Code, Congressional Service (1945)..... 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 507.

ALFRED SYLVANUS, ARCADIA NATIONAL INSURANCE COMPANY AND VOYLE CLARK JOHNSON,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petition for Certiorari (pp. 17-21) sets forth four reasons why the decision of the United States Court of Appeals for the Seventh Circuit should be reviewed. All involve important questions of Federal law not heretofore decided by this Court; two of them have resulted in a conflict of decision between Courts of Appeal.

The Government's brief only emphasizes the necessity of clarification of the Federal statutes involved and leaves unresolved the conflicting decisions of the Courts of Appeals.

I.

The Question of Construction of the McCarran Act.

The McCarran Act provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance * * *."

Sec. 1012, Title 15, U. S. Code.

The McCarran Act thus excludes from the application of *every* act of Congress (not specifically relating to insurance) every matter connected with the conduct of an insurance business which is subject to regulation under the State law.

There could hardly be a clearer instance of interference with State regulation of the insurance business than the decision in this case.

While the use of the mails gives the United States Courts jurisdiction, the conviction rests on a basic adjudication that the purpose or "scheme," to effect which the mails were used, was fraudulent, *i. e.*, in the instant case: (1) that the insurance policies (despite express approval thereof by the State authorities) were "cunningly worded" and deceptive; and (2) that the advertising matter published and circulated was so misleading as to constitute a fraud.

Both the policies and the advertising matter are subject to exclusive regulation by the State. The effect of the prosecution is thus to supersede entirely the State law and to condemn as fraudulent, acts in the conduct of an insurance business which are approved by the State, or for the doing of which the State law provides a penalty.

Without regard to legislative history, the language of the McCarran Act expressly prohibits such an interference with the State's powers over the insurance business.

But the legislative history is in accord with the language of the statute, not opposed to it. As stated by the House Committee in its report on the Act, its purpose was to assure those engaged in the insurance business that they could look to the State law and to State authorities for direction as to what they could or could not do, and that compliance with State regulations would not "subject insurance executives to both civil and criminal prosecutions" under Federal statutes.

U. S. Code, Congressional Service (1945) p. 671.
(Quoted in our Petition at p. 32.)

In the instant case, the insurance policies claimed to be fraudulent were expressly approved by the State; the advertising matter, if not all expressly approved, was passed without adverse comment in a series of exhaustive reports of the Illinois Insurance Department filed periodically during the period 1941 to 1948 (R. 772-842); and the alleged delay in payment of claims, of which the Government complains (Govt. Brief, p. 13) was found by the State to be nonexistent in a report stating that "policy claims appear to be paid promptly and in accordance with policy provisions." (R. 825.)

The case is similar to *North Little Rock Trans. Co.* v. *Casualty Reciprocal Exchange,* 181 Fed. (2d) 174 (C. A. 8; Cer. den. 340 U. S. 823), involving a suit for triple damages under the Sherman Act.

In that case, the defendant insurance companies were engaged in an interstate business. It was contended by the plaintiff, that, since interstate commerce is subject to exclusive Federal jurisdiction, the insurance companies were subject to suit under the Federal anti-trust laws for damages resulting from a monopolistic agreement affecting such commerce, entered into in Arkansas and relating to the conduct of the interstate insurance business, even though the agreement itself was subject to the regulations of the Arkansas law governing the conduct of that business.

As a defense, the insurance companies contended that they were not liable because (p. 175) "the conduct of which the plaintiff complained was regulated by the laws of the State of Arkansas * * * and that because of the Act of March 9, 1945 * * * known as the McCarran Act, the Sherman Act did not apply to the insurance business insofar as it was regulated by the State."

The Court sustained the defense and held that the McCarran Act barred the suit under the Federal statute, because its effect, if successfully prosecuted, would be to invalidate, impair, or supersede the provisions of the Arkansas law regulating the conduct of an insurance business.

The decision in the *North Little Rock* case is in direct conflict with the decision in the instant case. The jurisdiction of Congress over the mails is no more exclusive than its jurisdiction over interstate commerce. But the McCarran Act provides that no statute exercising such jurisdiction shall be construed to extend to acts relating to the conduct of a state-regulated insurance business unless such statute specifically relates to that business. If jurisdiction cannot be extended to acts performed in the conduct of an insurance business in a case involving interstate commerce, it cannot be so extended in a case involving the use of the mails. In either case, the prosecution, if successful, invalidates, impairs, or supersedes the State law relating to insurance.

Badders v. *United States,* 240 U. S. 391, cited in the Government's brief (p. 16) holding that a prosecution may be maintained under the mail fraud statute, even though based on a local fraud, is not in point. The principle laid down in that case is similar in effect to that applied in *United States* v. *Southeastern Underwriters,* 322 U. S. 533, in enforcing the Sherman Act. The purpose of the McCarran Act was to prevent further application of that principle, and thus to change the pre-existing law, in cases relating to the conduct of a state-controlled insurance business.

The question here involved, as to construction of the McCarran Act, is important and should be decided by this Court. This is particularly true in view of the conflict in the decisions of the Circuit Courts of Appeal.

II.

The Question As to the Sufficiency of the Conspiracy Count and of the Proof Thereunder.

The "overt act" required to sustain a conviction for conspiracy must be of such character that it commits the party performing it to the crime contemplated, so that he may not thereafter withdraw and be innocent; and it must be a positive step "to effect the object of the conspiracy."

Sec. 371, Title 18, U. S. Code.
United States v. *Britton*, 108 U. S. 199 (204-5).
United States v. *McLaughlin*, 169 Fed. 302 (307) (D. C. D., Minn.).

The supposed "overt acts" (R. 17-19), on which the charge of conspiracy rests here, are summarized at pages 12-13 of our petition. None of them has any connection with the use of the mails which was the supposed object of the conspiracy.

The only acts alleged to have been performed within the three-year limitation period were the incorporation of Arcadia Life and Casualty Company and its successor, and the election of Sylvanus as director. Those acts do not commit the defendants to the use of the mails for a fraudulent purpose or tend to carry into effect a design so to use them.

About the only act that could constitute an overt act in a mail fraud case would be the mailing of a letter, or at least some act connected therewith. It is the act of mailing a letter that is referred to in *Badders* v. *United States*,

240 U. S. 391 (393), cited by the Government, as the "*overt act*" which Congress may regulate.

There is thus no overt act charged or proved that would support the conspiracy count.

But the Government contends that any error in sustaining the conspiracy count was not material because there were substantive counts to support the conviction. (Government's brief, p. 18.)

That contention cannot stand. Much of the evidence introduced against the individual defendants would not have been admissible against one or the other of them, except for the conspiracy charge. There is no ground for the assumption that the jury was not influenced by that evidence or by the argument and instructions relating to that charge.

As this Court said in *Fiswick* v. *United States*, 329 U. S. 211 (218), (quoting from *Kotteakos* v. *United States*, 328 U. S. 750), in denying a contention that a like error in sustaining a conspiracy count was harmless:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

If the conspiracy count and the evidence offered had been excluded, the case would have been essentially different.

For the reasons stated in the brief in support of our Petition (pp. 35-37), we submit that the Court should pass on the question here raised.

III.

The Conflict in the Decisions As to the Duty of the Insured to Read His Policy and to Be Bound by the Terms Thereof.

The decision in this case is in direct conflict with the decision of the Court in *Bowers* v. *Washington Times,* 65 Fed. (2d) 200 (C. A. Dist. Col.), as to the duty of the insured to read his policy.

While the *Bowers* case was a civil suit, it was based on fraud rather than contract. In that case, Bowers, the applicant for insurance, had applied for the policy and paid for it, but was accidentally killed before it was issued to him. His administrator sued to recover $10,000 for accidental death on the ground that the advertisement, as a result of which the application for the policy was made, stated that $10,000 was the benefit for accidental death. The insurance company defended on the ground that the policy advertised, and tendered to the insured or his estate, paid $10,000 for deaths from travel accidents only, and paid only $500 for death from the accident there involved, and hence that $500 was the limit of recovery.

The advertisement read (p. 201):

> "Protect your family. Insure your life. One dollar provides protection for $10,000 to subscribers of the Washington Times and the big Sunday Washington Herald. A new and better accident policy in the Continental Life Insurance Co. (St. Louis, Mo.) For loss of life, $10,000. For loss of both eyes, $10,000. For loss of both hands, $10,000. For loss of both feet, $10,000. For loss of one hand and one foot, $10,000. For loss of one hand and sight of one eye, $10,000. For loss of one foot and sight of one eye, $10,000. For loss of one hand, $2,500. For loss of one foot, $2,500. For loss of one eye, $2,500. For loss of time per week, $20.00. With other provisions."

The reference to the policy in the advertisement in the *Bowers* case was thus not as specific as in the advertising matter in the case at bar, where each advertisement and circular letter tendered the policy for examination and referred the applicant to the policy for the specific terms of the insurance provided. Nonetheless the Court (in the *Bowers* case) held that the insured or his administrator was required to read the policy tendered and was bound by its terms limiting recovery for the death in that case to $500. As to this the Court said (p. 202):

> "The advertisement sets out in a prominent manner that the policy in question would contain other provisions. The insured was thereby notified that he should examine the policy in order to fully acquaint himself with its terms.
>
> It appears that the policy which was tendered to appellant after the death of decedent was of the standard type and form issued by the defendants in such transactions and referred to in the receipt which decedent received in his lifetime. There was no fraud or concealment in the character of the policy, nor were the terms of the advertisement such as to mislead any reasonably careful person."

That holding is exactly contrary to the decision of the Court of Appeals in the instant case that the insured was not bound to read his policy, and that the trial court did not err in refusing to give an instruction to that effect.

The argument in the Government's brief (p. 17) that there is no conflict between the two decisions because the *Bowers* case is a civil case is based on a misapprehension of the *Bowers* case. If there is any difference, a higher degree of proof of fraud is required in a criminal case than that required in a civil case.

We submit that the Court should grant a writ of certiorari in this case and that the decision of the Court of Appeals herein should be reversed.

Respectfully submitted,

ROGER SHERMAN,
HENRY F. TENNEY,
S. ASHLEY GUTHRIE,
Attorneys for Petitioners.

S. ASHLEY GUTHRIE,
Of Counsel.